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No. 97-569

In the Supreme Court of the United States

OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC., PETITIONER

v.

KIMBERLY B. ELLERTH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

When a supervisor threatens an employee with adverse job consequences for failure to comply with a sexual demand, must the employee either submit to the demand or suffer the adverse job consequence in order to maintain an action against the employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, for altering the terms or conditions of employment on the basis of sex.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits discrimination in terms and conditions of employment on the basis of sex. The Attorney General is responsible for enforcing Title VII with respect to public employers. 42 U.S.C. 2000e-5(f)(1). The United States, as an employer, has a strong interest in ensuring the fair and balanced enforcement of Title VII. The Equal Employment Opportunity Commission (EEOC) has authority to enforce Title VII with respect to private employers. The EEOC participated as amicus curiae in this case both in the panel and the en banc proceedings in the court of appeals.

STATEMENT

1. Because this case comes to this Court on petitioner's motion for summary judgment, the evidence must be viewed in the light most favorable to respondent. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).

When viewed in that light, the summary judgment record establishes the following:

In March 1993, respondent Kimberly B. Ellerth applied for a marketing job with petitioner Burlington Industries. Pet. App. 243a. After an initial interview with Mary Strenk Fitzgerald, an accounts manager, respondent interviewed with Fitgerald's supervisor, Theodore Slowik, a vice president of sales and marketing. *Id.* at 243a-244a. During the latter interview, Slowik asked respondent whether she and her husband were planning on having a family and whether they were "practicing at it." *Id.* at 244a-245a. Slowik also stared at respondent's breasts and legs for prolonged periods of time. *Id.* at 245a. About one week later, Slowik offered respondent a job in which respondent would report to Fitzgerald, and respondent accepted the offer. *Id.* at 244a. Slowik was stationed in New York, while Fitzgerald and respondent were stationed in Chicago. *Ibid.*

Respondent's work required her to meet with Slowik one or two days every month or two in Chicago, New York, and elsewhere, and to speak with him on the telephone approximately once per week. Pet. App. 244a. In those encounters and conversations, Slowik made sexual remarks, veiled threats, and unwelcome advances. During one trip to New York, Slowik told respondent several off-color offensive jokes. *Id.* at 245a. At a business lunch at which Slowik, respondent, and petitioner's vice president of international sales, Angelo Brenna, were present, Slowik told numerous offensive sexual jokes and rubbed respondent's knee under the table. *Id.* at 245a-246a. Respondent pulled her leg away when he touched it. *Id.* at 246a. As the three left the restaurant, Slowik walked several feet behind respondent and commented, "You have got great legs, Kim," and then asked Brenna what he thought. *Ibid.*

At another business meeting in Greensboro, North Carolina, Slowik invited respondent to join him at the

lounge, and respondent accepted. Pet. App. 247a. While there, Slowik commented that the female band members had nice breasts, nice legs, and nice skimpy outfits. *Ibid.* After looking at respondent's breasts, he then said, "You are a little lacking in that area, aren't you Kim." *Ibid.* Slowik also told respondent that she "ought to loosen up," and stared at respondent's legs and breasts for prolonged periods. *Ibid.* Upon leaving the lounge, Slowik said, "You know, Kim, I could make your life very hard or very easy at Burlington." *Ibid.* Respondent understood that to mean that she would have to have sex with Slowik in order to succeed at petitioner's company. *Ibid.*

After the Greensboro trip, Slowik made work-related calls to respondent on a weekly basis. Pet. App. 250a. Slowik used those calls as an opportunity to engage in sexual innuendo. He made comments such as, "How are those legs of yours, Kim;" he asked respondent whether she was still "practicing" having a family with her husband; he refused to give respondent a job assignment until she told him what she was wearing; and he told respondent that her job would be a "whole heck of a lot easier" if she wore short skirts. *Id.* at 250a-251a.

During one of Slowik's visits to the Chicago office, respondent was on her knees folding fabric samples, when Slowik said, "on your knees again, Kim?" Pet. App. 248a. Respondent understood the comment as a reference to fellatio. *Ibid.* During that same trip, while using respondent's desk to make a telephone call, Slowik said to respondent, "It's nice to have my butt where your butt was, Kim." *Ibid.*

At the annual company holiday party, Slowik patted respondent on the rear. Pet. App. 248a. During an interview for a promotion to the position of sales representative for the Midwest territory, Slowik rubbed respondent's knee while asking her whether the frequent travel associated with the position she was seeking would make her husband

miss her. *Id.* at 248a-249a. During that same interview, Slowik admitted that he had told others that he was hesitant to promote respondent because she was not "loose enough" for him. *Id.* at 249a. Two weeks later, Slowik promoted respondent to a position in which she would report to Patrick Lawrence. *Id.* at 244a. Lawrence, in turn, reported to Slowik. *Ibid.* At the same time, Slowik made a sexually inappropriate comment that reduced respondent to tears. *Id.* at 249a.

Petitioner's employee handbook included a statement that "[T]he company will not tolerate any form of sexual harassment in the workplace. * * * [I]f you have any questions or problems, or if you feel you have been discriminated against, you are encouraged to talk to your supervisor or human resources representative or use the grievance procedure promptly." Pet. App. 272a. Respondent did not talk to either of her immediate supervisors or the human resources manager about Slowik's treatment of her. *Id.* at 251a. Respondent feared that such a complaint would put her job in jeopardy. *Ibid.*

In May 1994, Lawrence cautioned respondent to be more careful about returning telephone calls to customers. Pet. App. 252a. Respondent left a message on Lawrence's telephone answering machine that she was quitting her job, and faxed him a letter to the same effect. *Ibid.* Three weeks later, she sent a detailed letter explaining that she was quitting because of Slowik's harassment of her. *Ibid.*

2. In February 1995, respondent filed suit against petitioner in the United States District Court for the Northern District of Illinois. She alleged that petitioner, through its supervisor, Slowik, discriminated against her on the basis of sex by sexually harassing her during the course of her employment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 241a-242a.

The district court granted summary judgment for petitioner. Pet. App. 241a-287a. The court concluded that a reasonable jury could find that Slowik had subjected respondent to a hostile work environment. *Id.* at 261a-266a. The court held, however, that petitioner could not be held liable for Slowik's conduct in that regard. *Id.* at 266a-287a. The court concluded that (1) Slowik's harassment of respondent was not within the scope of his employment (*id.* at 268a-270a); (2) petitioner was neither negligent nor reckless in remaining unaware of the harassment (*id.* at 270a-273a); and (3) Slowik did not act with apparent or delegated authority in harassing respondent (*id.* at 274a-280a).

The court refused to assess petitioner's liability under a *quid pro quo* theory, because it determined that respondent had not raised that theory of liability in her complaint. Pet. App. 284a, 264a n.10. The court noted, however, that "imbedded in Slowik's harassment of Ellerth is a *quid pro quo* proposition," and that "[i]t would not be unreasonable to conclude that every effort toward achievement that Ellerth made at Burlington was tainted by Slowik's threat, 'I could make life very hard for you.'" *Id.* at 264a-265a.

3. A panel of the Seventh Circuit reversed the grant of summary judgment for petitioner and remanded for further proceedings. Pet. App. 209a-239a. The panel held that respondent's complaint encompassed a claim for *quid pro quo* sexual harassment, *id.* at 219a-220a, and that respondent's evidence raised a genuine issue of material fact to support that theory, *id.* at 220a-221a. The panel also held that petitioner could be held liable under both *quid pro quo* and hostile work environment theories. *Id.* at 221a-233a. Applying common law agency principles, the court held that respondent's evidence supported a finding that Slowik was acting within the scope of his employment when he harassed her. *Id.* at 230a-231a.

4. On rehearing en banc, the court of appeals reversed in part and affirmed in part. Pet. App. 1a-207a. The court held that respondent had presented sufficient evidence to resist summary judgment on her *quid pro quo* claim, *id.* at 6a-7a, but that she had waived her claim of a hostile work environment by disavowing any claim that petitioner was negligent, *id.* at 28a (Flaum, J.), 59a (Posner, C.J.).[1] The 11-judge court[2] issued a per curiam decision, followed by seven separate opinions.

a. Judge Flaum (joined by Judges Cummings, Bauer, Kanne (in part) and Evans) filed the lead opinion. Pet. App. 8a-28a. In that opinion, Judge Flaum concluded that an employer is vicariously liable when a supervisor engages in *quid pro quo* harassment, and that *quid pro quo* harassment includes making submission to sexual demands a condition of tangible job benefits. *Id.* at 9a-10a. In reaching that conclusion, Judge Flaum relied on the agency principle that an employer is liable for the acts of an agent that are made possible by the employer's delegation of authority to the agent. *Id.* at 12a. He reasoned that, "because a supervisor would be unable to engage in *quid pro quo* harassment without the authority and power furnished by the employer, the supervisor's conduct is properly imputed to the employer." *Id.* at 13a. Employer liability for *quid pro quo* harassment, Judge Flaum added, also best serves Title VII's goal of deterrence, because it provides employers with "an incentive to foster a culture in which harassment is not tolerated." *Id.* at 16a.

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[1] Because Title VII does not distinguish between the two types of sexual harassment, it would be more accurate to say respondent waived her claim that petitioner was negligent with regard to sexual harassment; to the extent negligence is not necessary, her claim is not waived, regardless of the label that is attached to the discrimination.

[2] A 12th judge (Cudahy) participated only with regard to a different case that was consolidated with this one for purposes of appeal. Pet. App. 29a.

Judge Flaum concluded that proof of an adverse job consequence is not a necessary element of a *quid pro quo* claim. Pet. App. 17a. Instead, it is sufficient if plaintiff can show that a supervisor has issued a serious threat that "clearly conditions concrete job benefits or detriments on compliance with sexual demands." *Ibid.* Judge Flaum explained that "a clear and serious *quid pro quo* threat alters the 'terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled." *Ibid.*

Judge Flaum concluded that agency principles support employer liability for such threats, because "[m]aking a clear and unambiguous threat of an adverse job consequence is an exercise of the supervisor's delegated authority, just as actually inflicting the consequence invokes that authority." Pet. App. 17a. Judge Flaum also noted that "[a] supervisor's unambiguous communication that adverse job action is imminent if sexual favors are not forthcoming causes the employee real emotional strife," *id.* at 19a, and that Congress specifically sought to provide compensation for such emotional damage when it enacted the 1991 amendments to Title VII, *id.* at 18a. Imposing employer liability in such circumstances, Judge Flaum added, serves the goal of preventing such abuse from occurring by "creating incentives for companies to take steps in hiring and training their supervisors." *Id.* at 18a-19a. Judge Flaum also made clear that, in order to establish a valid claim, a victim must show that she "reasonably believed that it was within the supervisor's power to affect the conditions of the plaintiff's job." *Id.* at 19a.

Judge Flaum concluded that respondent had put forward sufficient evidence to resist a motion for summary judgment on her *quid pro quo* harassment claim. Judge Flaum relied on Slowik's statements that he could make respondent's life hard or easy, that he did not have time for her

unless she told him what she was wearing, that wearing shorter skirts would make her job easier, and that he was hesitant to promote her because she was not loose enough for him. Pet. App. 27a. From those statements, Judge Flaum concluded, "a reasonable jury could conclude that Slowik was conditioning or threatening to base 'the terms and conditions' of [respondent's] employment on [respondent's] catering to Slowik's sexual desires, and thus subjected her to compensable *quid pro quo* harassment." *Ibid.* Judge Flaum concluded that respondent had waived her hostile environment claim by conceding that petitioner had not been negligent. *Id.* at 28a.

b. Judge Kanne filed a concurring opinion. Pet. App. 33a-34a. He concluded that an employee can establish a *quid pro quo* claim without proof of an adverse employment consequence. *Id.* at 33a. He concluded, however, that an employer should be liable for such a *quid pro quo* threat only if the plaintiff can establish employer negligence in failing to obviate the threat. *Ibid.*

c. Chief Judge Posner (joined by Judge Manion) filed an opinion dissenting as to Ellerth. Pet. App. 35a-59a. In his view, when a supervisor brings about a significant alteration in the terms or conditions of the victim's employment, such as by denying a promotion or blocking a pay raise, the employer should be vicariously liable. *Id.* at 49a. Chief Judge Posner believed that employers should be responsible for monitoring such "company acts" through a process of review. *Id.* at 49a-50a. On the other hand, Chief Judge Posner concluded that vicarious liability was not appropriate when the supervisor threatens adverse employment consequences, but does not impose them, because "there is no way in which a system for vetting such acts would catch him." *Id.* at 50a-51a. Applying those principles, Chief Judge Posner concluded that petitioner could not be held liable on a *quid pro quo* theory, because Slowik never committed a company act. *Id.* at 57a-58a. He concluded

that petitioner had waived her claim of a hostile work environment by waiving a claim of negligence. *Id.* at 59a.

d. Judge Coffey filed an opinion dissenting as to Ellerth. Pet. App. 60a-142a. He agreed with Chief Judge Posner that plaintiffs may not establish *quid pro quo* harassment without showing "that they have actually suffered a tangible, job-related loss (such as being fired or denied a promotion) for refusing to go along with the harasser's sexual demands." *Id.* at 105a (emphasis omitted). Because respondent failed to show that she suffered such a tangible job-related loss, Judge Coffey concluded, she failed to establish a claim of *quid pro quo* harassment. *Id.* at 104a. He further would have held that an employer is liable for *quid pro quo* harassment only when there is proof of negligence. *Id.* at 129a. And he concluded that petitioner had waived her claim of negligence. *Id.* at 130a.

e. Judge Easterbrook filed an opinion concurring in the result as to Ellerth. Pet. App. 143a-152a. He concluded that employer liability should be determined by reference to state agency law, *id.* at 143a, and that Illinois imposes vicarious liability on employers for supervisory harassment, regardless of whether the harassment takes the form of a *quid pro quo* or a hostile environment, *id.* at 148a. Judge Easterbrook viewed respondent as having alleged and preserved a hostile work environment claim, not a *quid pro quo* claim, however, because Slowik did not carry through on his implicit threat that he would hinder respondent's advancement if she did not provide sexual favors and because respondent did not submit to that threat. *Id.* at 151a-152a.

f. Judge Manion (joined by Chief Judge Posner) filed an opinion dissenting as to Ellerth. Pet. App. 153a-172a. His views essentially tracked those of Chief Judge Posner that an employer is strictly liable only for company acts, *id.* at 155a-155a, and that in order to establish a claim of *quid pro*

quo harassment, an employee must show that the supervisor imposed a tangible job detriment, *id.* at 159a.

g. Judge Wood (joined by Judge Easterbrook and Judge Rovner) filed an opinion concurring in the result as to Ellerth. Pet. App. 173a-207a. Judge Wood concluded that when a supervisor, acting within the scope of his authority as determined under the applicable state law, engages in discriminatory conduct, the employer should be liable under principles of respondeat superior, without regard to whether the acts are characterized as *quid pro quo* demands, or the infliction of a hostile environment. *Id.* at. 175a. Judge Wood rejected the distinction between *quid pro quo* demands and a hostile work environment, because "[i]n the real world, sexual harassment does not sort itself into tidy categories," and there is no clear demarcation between the two. *Id.* at 177a.

Applying the scope of employment test, Judge Wood concluded that respondent had introduced sufficient evidence to defeat summary judgment. Pet. App. 205a-206a. Judge Wood believed that Slowik had acted within the scope of his employment when he refused to give respondent work assignments unless she described her physical appearance to him. *Ibid.* Judge Wood further concluded that, when interpreted in light of Slowik's remark that he could make life for respondent very easy or very hard, a jury could find that respondent "had to play the role of sex object in order to obtain desirable work assignments (and thus to advance in the company)." *Id.* at 205a-206a. Judge Wood also concluded that respondent had not waived her right to support her hostile work environment claim on a negligence theory, and that she had presented sufficient evidence to support a finding that petitioner was negligent. *Id.* at 206a-207a.

SUMMARY OF ARGUMENT

A. Because the term "*quid pro quo*" harassment does not appear in Title VII, there is no need to proceed on an elusive quest for its true meaning. Instead, the relevant inquiries in this case are whether a supervisor's threat of adverse job consequences for failure to submit to his sexual demands alters a "term" or "condition" of employment, and whether the "employer" is vicariously liable for such conduct under Title VII and agency principles. 42 U.S.C. 2000e-2(a)(1).

B. "Terms" of employment are "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Webster's Third New International Dictionary* 2358 (1976). That definition is satisfied when a supervisor who has authority to grant a job benefit conditions that benefit on a subordinate's submission to his sexual demands. The employee may decide not to accede to the demand, and the supervisor may decide not to enforce it, and those decisions may affect the extent of recoverable damages. But as long as the employee reasonably believes that the threat is genuine, and the supervisor has authority to grant or withhold the benefit, the employee labors under a discriminatory "term" of employment.

Petitioner errs in contending that there can be no discrimination and no harm unless the employee submits or the supervisor retaliates. When a supervisor informs a woman that she may advance in the company only if she submits to the supervisor's sexual demand, and the supervisor does not establish such a condition on advancement for males, Title VII's test of discrimination is satisfied. *Oncale* v. *Sundowner Offshore Serv.*, No. 96-568 (Mar. 4, 1998), slip op. 5. And requiring a woman to labor under such a term of employment can cause real emotional strife.

Petitioner's effort to discount such harm as insufficiently tangible is based on a profound misunderstanding about the scope of Title VII's protections. Congress intended to strike at the entire spectrum of disparate treatment between men and women, not simply discrimination that causes tangible harm. *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 64 (1986).

C. Under Title VII and common law agency principles, an employer is vicariously liable for discrimination that results from a supervisor's abuse of his delegated authority. That is why an employer is liable when a supervisor fires an employee because of her race or sex, regardless of whether the employer knew or should have known about the discrimination. That same principle is applicable here. Included in the supervisor's power to fire, promote, and evaluate is the power to threaten to use that power if certain conditions or requirements are not satisfied. Thus, when a supervisor abuses that delegated power by conditioning job benefits on submission to sexual demands, the employer is vicariously liable.

Petitioner's effort to limit vicarious liability to "company acts," such as promotions, pay raises, and terminations is unpersuasive. Petitioner's contention that vicarious liability should be limited to such acts rests on a mistaken factual premise—that discrimination in such acts is categorically easier for employers to detect. The reality is that, when a supervisor makes an adverse employment decision based on a subordinate's refusal to submit to a sexual demand, he will almost always explain the decision in ways that make it appear legitimate. Ease of detection depends on the facts of each case, not on the form of harassment.

Company acts are properly imputed to the employer for two reasons. First, they rest on an unambiguous invocation of company power. And second, there is no ambiguity about the wrongfulness of the conduct, making it relatively easy for management to communicate a clear prohibition. Both of those characteristics are also present, however, in any case in which a supervisor threatens to impose an adverse employment consequence if a subordinate does not submit to a sexual demand. For purposes of imputing liability to the employer, it makes no difference whether the subordinate complies with the extortionate demand, refuses and suffers anxiety about the likely outcome, or refuses and is fired.

ARGUMENT

AN EMPLOYER IS LIABLE FOR DISCRIMINATION UNDER TITLE VII WHEN A SUPERVISOR THREATENS AN EMPLOYEE WITH ADVERSE JOB CONSEQUENCES FOR FAILURE TO SUBMIT TO HIS SEXUAL DEMANDS

A. The Relevant Inquiries Are Whether A Supervisor's Threat Of Adverse Job Consequences For Failure To Submit To His Sexual Demands Alters A "Term" Of Employment And Whether Such Conduct May Be Attributed To The "Employer"

1. Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer * * * to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). In *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986), the Court held that employment discrimination that takes the form of sexual harassment can violate Title VII. The Court explained that, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64. The Court also held that such discrimination can alter the "terms, conditions, or privileges of employment." *Ibid.* That

phrase, the Court explained, "is not limited to 'economic' or 'tangible' discrimination," but instead "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women.'" *Ibid.*

Based on that interpretation of the statutory terms, the Court in *Meritor* held that Title VII's protection against sexual harassment not only encompasses a prohibition against harassment that is "directly linked to the grant or denial of an economic *quid pro quo*," but also provides protection against sexual harassment that takes the form of a "hostile work environment." 477 U.S. at 65. The Court defined a hostile work environment as one in which the harassment is "sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67. The Court also referred to a hostile work environment as "non *quid pro quo* harassment." *Id.* at 65.

This Court's subsequent sexual harassment cases have all involved claims of a hostile work environment and have elaborated on the proof required to establish such a claim. In *Harris* v. *Forklifts Systems, Inc.*, 510 U.S. 17, 22 (1993), the Court held that a plaintiff must show that "the environment would reasonably be perceived, and is perceived, as hostile or abusive." In deciding whether a plaintiff has satisfied that standard, a factfinder should consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance"; *id.* at 23. In *Oncale* v. *Sundowner Offshore Services*, No. 96-568 (Mar. 4, 1998), the Court emphasized that a hostile work environment is not created by "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex," and that "ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation," should not be

mistaken "for discriminatory 'conditions of employment.'" Slip op. 6. The Court has not yet addressed a claim of *quid pro quo* harassment.

2. In *Meritor*, the Court also addressed the question of when an employer is liable for a supervisor's sexual harassment of a subordinate. The court of appeals in that case had held that employers are always automatically liable for sexual harassment by their supervisors. 477 U.S. at 72. The employer argued that a policy against discrimination with a grievance procedure, coupled with an employee's failure to invoke that procedure, should insulate an employer from liability. *Ibid.* The Court rejected both of those per se rules. By defining "employer" to include any "agent," Congress indicated that it "wanted courts to look to agency principles for guidance." *Ibid.* The Court cautioned, however, that "common-law principles may not be transferable in all their particulars to Title VII." *Ibid.* *Meritor* therefore contemplates that, in deciding whether an employer is liable for sexual harassment in the workplace, a court should apply common law agency principles, modified to the extent necessary to conform to the purposes of Title VII.

3. Petitioner contends (Br. 16) that *quid pro quo* harassment occurs only when a supervisor demands sexual favors from an employee and the employee either submits to the demand or suffers a tangible job detriment for failing to submit. Under petitioner's proposed test, if the supervisor clearly states that he will take an adverse employment action unless the subordinate submits to his sexual demand, but the subordinate does not submit and the supervisor fails to impose the adverse employment consequence, the subordinate cannot establish a *quid pro quo* claim. Petitioner argues that his theory would have two consequences for cases in which there is neither submission nor retaliation. First, it would affect the standard for proving an alteration in the terms or conditions of em-

ployment: rather than proving that the supervisor demanded sexual favors in exchange for a job benefit that he had authority to grant, plaintiff would be required to show that the supervisor's conduct was so severe or pervasive that it created a hostile work environment. Br. 16 n.12, 18. Second, it would affect the standard for determining whether discrimination may be imputed to the employer. Rather than relying on a theory of vicarious liability, petitioner argues, plaintiffs would be required to show that the employer knew or should have known about the harassment and failed to take appropriate corrective action. Br. 21-23.

Petitioner's approach is misguided. The term *quid pro quo* harassment does not appear in Title VII. The relevant statutory inquiries are whether "discriminat[ion] * * * because of * * * sex" affects the "terms [or] conditions of employment," and whether such discrimination may be attributed to the "employer" under common law agency principles modified to the extent necessary to conform to Title VII's purposes. 42 U.S.C. 2000e-2(a)(1). Thus, rather than proceeding on an elusive quest for the true meaning of *quid pro quo* harassment, the better approach is to decide directly whether the statutory standards have been met. In particular, the first question is whether a supervisor's threat of adverse job consequences for failure to submit to his sexual demands alters a "term or condition" of employment, without regard to whether the employee later submits to the condition, or the supervisor later imposes the adverse job consequence. The second question is whether the "employer" is vicariously liable for such discrimination under common law agency principles modified to the extent necessary to conform to Title VII's purposes.

B. A Supervisor's Threat Of Adverse Job Consequences For Failure To Submit To His Sexual Demands Alters A "Term" Of Employment

1. "Terms" of employment are "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Webster's Third New International Dictionary* 2358 (1976); see also *The Random House Dictionary of the English Language* 1956 (2d ed. 1987) (defining terms as "conditions or stipulations limiting what is proposed to be granted or done"). That definition is satisfied when a supervisor who has authority to grant a job benefit conditions that benefit on a subordinate's submission to his sexual demands. For example, if a supervisor in charge of promotion decisions makes clear that a subordinate's advancement in the company depends on her submission to his sexual demands, and no similar condition is placed on male employees, the subordinate immediately labors under a new, discriminatory term of employment. That "term" is that, in order to advance in the company, the employee, because of her sex, must submit to a sexual demand. The employee may decide not to accede to the demand, and the supervisor may decide not to enforce the term, and those decisions may affect the extent of damages that the subordinate may claim. But as long as the employee reasonably believes that the threat is genuine, and the supervisor has authority to grant or withhold the benefit, the employee labors under a discriminatory "term" of employment.

2. The EEOC's Guidelines reinforce that conclusion. Those Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65 (internal quotation marks and citations omitted). Since the EEOC's Guidelines first addressed the is-

sue of sexual harassment in 1980, they have provided in relevant part:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

29 C.F.R. 1604.11(a).

Subsection (1) is applicable here. When a supervisor says either implicitly or explicitly that an employment benefit depends on submission to a sexual demand, "submission to [the sexual demand] is made either explicitly or implicitly a term or condition of an individual's employment." Under subsection (1), the alteration in the terms of employment occurs at the moment when the supervisor verbally links a tangible job benefit to submission to his sexual demands, provided that the subordinate reasonably believes both that the threat is genuine and that the supervisor has authority to confer or withhold the benefit. In contrast, subsection (2) applies when an employee's response to sexual advances is later used to determine some other job benefit, such as compensation, and subsection (3) describes a hostile environment claim. Petitioner would limit claims of sexual harassment to those set forth in subsections (2) and (3), and eliminate altogether the form of sexual harassment set forth in subsection (1).

3. Consistent with the text of Title VII and the EEOC Guidelines, three courts of appeals have concluded that a supervisor's statement that a job benefit depends on the employee's submission to his sexual demands immediately alters the employee's terms or conditions of employment, and that a later adverse employment consequence is not a necessary element of such a claim The Second Circuit has stated that "once an employer conditions any terms of employment upon the employee's submitting to unwelcome sexual advances, a *quid pro quo* claim is made out." *Karibian* v. *Columbia Univ.*, 14 F.3d 773, 779, cert. denied, 512 U.S. 1213 (1994). That court further stated that "[t]he focus should be on the prohibited conduct, not the victim's reaction." *Ibid.* The Third Circuit has held that "a *quid pro quo* violation occurs at the time when an employee is told that his or her compensation, etc. is dependent upon submission to unwelcome sexual advances." *Robinson* v. *City of Pittsburgh*, 120 F.3d 1286, 1297 (1997). "The threat is sufficient to constitute 'discriminat[ion] * * * with respect to * * * compensation, terms, conditions, or privileges of employment because of * * * sex.'" *Ibid.* And, adopting the test proposed by Judge Reinhardt in *Nichols* v. *Frank*, 42 F.3d 503, 513 (1994), the Ninth Circuit has held that, in order to establish *quid pro quo* harassment, an employee must show that "an individual 'explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct.'" *Heyne* v. *Caruso*, 69 F.3d 1475, 1478 (1995). Under that standard, "a supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes quid pro quo sexual harassment." *Nichols*, 42 F.3d at 513 (Reinhardt, J.).

4. Petitioner contends (Br. 17 & n.14.) that the act of conditioning a job benefit on submission to a sexual de-

mand cannot violate Title VII because, unless the employee submits or the supervisor imposes the threatened job consequence, there is no discrimination and no harm. For purposes of determining whether sexual harassment constitutes "discrimination" under Title VII, however, "[t]he critical issue is * * * whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, slip op. 5. When a male supervisor informs a woman that she may advance in the company only if she submits to his sexual demand, and the supervisor does not establish such a condition on advancement for males, Title VII's test of discrimination is satisfied. *Ibid.* As this Court explained in *Oncale*, "the inference of discrimination is easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex." *Ibid.*

Moreover, contrary to petitioner's view that an employee suffers no harm in such circumstances, requiring a women to choose between retaining her personal dignity and obtaining a job benefit can cause "real emotional strife." Pet. App. 19a (Flaum, J.). For example, suppose a supervisor tells a subordinate that she will not receive her normal yearly pay raise unless she submits to his sexual demands in the interim. An employee who does not submit to the supervisor's sexual demands and must live under such a threat for one year "may well undergo anxiety, distress, and loss of productivity regardless of whether the threat is carried out." *Ibid.* Petitioner errs in contending (Br. 16) that such harms may be discounted because they are not sufficiently "tangible." As the Court explained in *Meritor*, Congress intended "to strike at the entire spectrum of disparate treatment of men and women in employment," not just discrimination that could be characterized

as causing a "tangible" harm. 477 U.S. at 64. (internal quotation marks and citations omitted).

C. An Employer Is Vicariously Liable When A Supervisor Threatens An Employee With Adverse Job Consequences For A Failure To Submit To His Sexual Demands

1. Under common law agency principles, an employer is vicariously liable when it delegates authority to an agent and the agent misuses that authority and causes harm. When the agent is motivated in part by a desire to further the employer's interest, the employer is liable because the agent acts within the scope of his employment. Restatement (Second) of Agency § 219(1), at 481 (1958). When the agent is solely motivated by a desire to further his personal interests, the employer is vicariously liable because the agent "is aided in accomplishing the tort by the existence of the agency relation." *Id.* § 219(2), at 481. In either event, the employer is vicariously liable, because the employer's delegation of authority makes the injury suffered by the victim possible.

In keeping with that principle, courts of appeals have consistently held that, when a supervisor refuses to hire or discharges an employee on the basis of race or sex, that act is attributed to the employer, regardless of that employer's policies. *Long* v. *Eastfield College*, 88 F.3d 300, 306-307 (5th Cir. 1996); *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); *Anderson* v. *Methodist Evangelical Hosp., Inc.*, 464 F.2d 723, 725 (6th Cir. 1972). Because the discrimination is made possible by the employer's delegation of authority to the supervisor to hire and discharge employees, the employer is vicariously liable. See *Meritor*, 477 U.S. at 70-71 (noting that "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions").

That same rationale explains the uniform holdings of courts of appeals that, when a supervisor imposes an adverse employment consequence on an employee because she refused to submit to a sexual advance, the employer is liable, without regard to whether the employer knew or should have known about the harassment, and without regard to whether the employer had a policy prohibiting such conduct. *Davis* v. *City of Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols* v. *Frank*, 42 F.3d at 513-514; *Bouton* v. *BMW, Inc.*, 29 F.3d 103, 106-107 (3d Cir. 1994); *Karibian*, 14 F.3d at 777; *Sauers* v. *Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman* v. *Allied Signal, Inc.*, 970 F.2d 178, 185-186 (6th Cir.), cert. denied, 506 U.S. 1041 (1992); *Steele* v. *Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989). Because the supervisor would be unable to impose the adverse employment consequence without the authority and power furnished by the employer, the supervisor's conduct is properly imputed to the employer. Indeed, petitioner concedes as much. Br. 21.

The principle that an employer is vicariously liable when an agent abuses his delegated authority is also applicable when a supervisor uses his delegated authority to condition a job benefit on submission to a sexual demand. As Judge Flaum explained, "[m]aking a clear and unambiguous threat of an adverse job consequence is an exercise of the supervisor's delegated authority, just as actually inflicting the consequence invokes that authority," for "[i]ncluded in the supervisor's delegated power to hire, fire, promote, evaluate is the authority to threaten to use that power if certain conditions or requirements are not satisfied." Pet. App. 17a. For example, "no one would question that a supervisor was exercising the authority entrusted to him if he informed an employee that the employee would be fired if his work did not improve." *Ibid.* Thus, when a supervisor abuses that delegated authority by conditioning concrete job benefits or detriments on

compliance with sexual demands, the employer is vicariously liable. *Ibid.*

That is the same position that the United States and the EEOC advanced in *Meritor*. As the Court in *Meritor* noted, we argued there that "where a supervisor exercises the authority actually delegated to him by his employer, by making *or threatening to make* decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them." 477 U.S. at 70 (emphasis added).

2. Imposing vicarious liability on an employer when a supervisor uses his delegated authority to condition a job benefit on submission to a sexual demand is also consistent with the purposes of Title VII. One major purpose of Title VII is to provide a "spur" or a "catalyst" for an employer to eliminate discrimination from its workplace. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). Holding an employer liable when a supervisor conditions a job benefit on submission to a sexual demand provides just such a catalyst. When an employer knows that it will be liable in such circumstances, the employer has a strong incentive to formulate the hiring, training, grievance, and disciplinary procedures that are best calculated to prevent such a misuse of authority from occurring or recurring. Cf. *American Soc. of M.E.'s* v. *Hydrolevel Corp.*, 456 U.S. 556, 572 (1982) ("the possibility of civil liability will inevitably be a powerful incentive" for an entity to "take systematic steps to make improper conduct on the part of all its agents unlikely").

One of the principal stated justifications for the common law rule imposing liability on employers for the acts of their agents without regard to employer fault is that it induces employers to intensify their efforts to prevent their agents from causing harm. Fleming James, Jr., *Vicarious Liability*, 28 Tul. L. Rev. 161, 168 (1954). That

justification is particularly persuasive here. Indeed, this Court has recognized that one important purpose of monetary relief under Title VII is to give managers an "incentive to take preventive measures to ward off discriminatory conduct by subordinates *before* it occurs." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 283 n.35 (1994).

A second major purpose of Title VII is to compensate the victims of discrimination. *Albemarle*, 422 U.S. at 418. With the enactment of the Civil Rights Act of 1991, which authorizes compensatory damages for intentional violations of the Act, 42 U.S.C. 1981a(b), that purpose has assumed increased significance in cases of sexual harassment. The 1991 Act evidences Congress's view that the victims of sexual harassment should be compensated "for the terrible injury to their careers, to their mental, physical, and emotional health, to their self-respect and dignity, and for other consequential harms." 137 Cong. Rec. 30,661 (1991) (section-by-section analysis of Rep. Edwards). Holding an employer liable when a supervisor conditions a job benefit on submission to a sexual demand furthers that compensatory goal as well. As previously discussed, when a supervisor engages in such conduct, it can cause the very harms to personal dignity and emotional health that the 1991 Act seeks to compensate.

One of the reasons the common law holds employers liable for the wrongdoing of agents who abuse their authority is to ensure that the victims of wrongful conduct do not go uncompensated. James, *supra*, 28 Tul. L. Rev. at 169-170; *Prosser and Keeton on the Law of Torts* 500-501 (W. Page Keeton ed., 5th ed. 1984). The common law approach rests on the view that, because the employer has sought to profit through the use of agents, the employer, rather than the innocent victim, should bear the costs when those agents abuse their delegated authority and cause injury. *Ibid.* That common law rationale is fully applicable here. Because supervisors are not subject to personal liability

under Title VII, unless petitioner is vicariously liable for Slowik's alleged conduct, even if respondent proves that she has been subjected to employment-related sexual harassment, she will have no federal remedy at all. The district court noted the disturbing quality of that result:

> Needless to say, the facts of this case are unfortunate because no person should have to endure the objectification and humiliation that [respondent] was allegedly forced to endure at the hands of Slowik * * * The outcome is unfortunate in the sense that Slowik, if [respondent's] allegations are true, is able to walk away from this episode unscathed and [respondent] unable to recover.

Pet. App. 285a-286a. That unfortunate result may be avoided through application of ordinary principles of vicarious liability.

3. We have argued in our brief in *Faragher* v. *City of Boca Raton*, No. 97-282 (argued Mar. 25, 1998), that the question whether an employer is liable for a hostile work environment involves a fact-intensive inquiry into whether, in light of the scope of the delegation of authority, the employer's anti-harassment policies, and the conduct of the supervisor, the subordinate reasonably fears adverse employment consequences if she resists or complains. 97-282 U.S. Amicus Br. at 17-24. That fact-intensive inquiry is necessary in order to determine whether the supervisor's delegated powers made the creation of a hostile work environment possible or whether the supervisor instead simply took advantage of his proximity to the subordinate in the same way that a co-worker could. There is no need for that same fact-intensive inquiry in the present context. When a supervisor states through an explicit or veiled threat that, in order to obtain a job benefit, a subordinate must submit to his sexual demands, it is clear that the delegation of power from the employer

to the supervisor has made the imposition of a discriminatory term of employment possible.

Imposing vicarious liability in such circumstances is supported by an additional consideration as well. Although it is not always possible to establish clear-cut lines separating legitimate sexual banter and rude behavior from conduct that creates a hostile environment, there are no such line-drawing problems in the present context. There is no legitimate reason for a supervisor to demand sexual favors in return for job benefits; nor could such a demand be viewed as only mildly rude or obnoxious. Such threats are per se illegitimate and indefensible. Employers should therefore have no difficulty effectively communicating to their supervisors that conditioning job benefits on submission to sexual demands will not be tolerated, and employers may fairly be held liable for any deviation from that clearly defined norm. Pet. App. 21a-22a (Flaum, J.).

4. Finally, petitioner errs in contending (Br. 21-22) that vicarious liability should be limited to so-called company acts, such as hiring, firing, and promotions. The theory underlying that contention is that company acts based on failure to comply with sexual demands are more susceptible than other forms of sexual harassment—whether extortionate or otherwise—to detection and prevention by an employer, through a process of review. Pet. App. 51a-53a (Posner, C.J.). That theory rests on a mistaken factual premise, and results in drawing a line between forms of harassment that are not different in any relevant way. The factual premise is mistaken because, when a supervisor's hiring, promotion, pay, or termination decision is based on failure to comply with sexual demands, the supervisor will ordinarily explain the decision in ways that make it appear legitimate. The extortionate demand will be equally difficult or easy for management to uncover whether the employee complies with it, refuses and suffers anxiety over the likely consequences, or refuses and is

fired. Moreover, the extortionate demand may be easier or harder to detect than the creation of a hostile environment by other forms of harassing conduct continuing over time. Ease of detection depends on the facts of the particular case, and not on the general form of harassment.

Vicarious liability is appropriate for "company acts" not because they make detection of wrongdoing easier, but for two other reasons. First, in the case of a company act there is an unambiguous invocation of company power, unlike some forms of harassment, which may present a question about whether the supervisor was invoking company power or merely taking advantage of proximity to engage in harassing behavior. Second, there is no ambiguity about the wrongfulness of firing or otherwise imposing adverse job consequences on a person for failure to comply with a sexual demand, and thus it is relatively easy for management to communicate a clear prohibition, in contrast to other forms of hostile environment discrimination which may raise questions about the severity and even the unwelcomeness of the conduct. Both of those factors, however, are present in any case of an extortionate demand for sexual favors, whether the employee complies, refuses and suffers anxiety about the likely outcome, or refuses and is fired. The extortionate demand is an unambiguous invocation of the employer's authority, no matter which of the three outcomes occurs. Likewise, the employer's ability to communicate a clear prohibition on such extortionate demands does not depend on which of the three outcomes occurs. There is simply no reason to distinguish among those outcomes in imposing liability on an employer for a supervisor's act of threatening an employee with adverse job consequences for failure to comply with a sexual demand.

D. Respondent Presented Sufficient Evidence To Resist Petitioner's Motion For Summary Judgment

For the reasons discussed above, a plaintiff can establish that there has been discrimination in a term or condition of employment for which the employer is liable by showing that a supervisor conditioned a job benefit on submission to his sexual demands. In this case, respondent presented evidence from which a reasonable jury could make such a finding. In particular, respondent presented evidence that Theodore Slowik, a company vice president, told her that he could make respondent's life hard or easy. Respondent also presented evidence that Slowik told her that he would not give her assignments unless she told him what she was wearing. And respondent introduced evidence that Slowik confirmed that he was hesitant to promote her because she was not "loose enough" for him. Pet. App. 27a. From those statements, a reasonable jury could conclude that Slowik was conditioning respondent's advancement in the company on respondent's catering to his sexual desires.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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